No. 96-961787 MAY 5 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANA CORPORATION PARISH DIVISION,

Petitioner,

v.

ROBERT LEE NEWTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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38 pp

QUESTIONS PRESENTED

1. Whether the Court should reconsider and modify the standard it articulated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1968) and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 421 (1978), establishing a "dual" standard for recovery of attorneys' fees by a prevailing party under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), under which (i) a prevailing employee "ordinarily" will recover attorneys' fees, but (ii) a prevailing *employer* is held to a heightened standard for recovery of attorneys' fees, when the "dual" standard is not consistent with the plain language of §2000e-5(k), should be reconsidered in the context of the 400% increase in the number of employment discrimination cases since this Court created the "dual" standard in 1978, and is inconsistent with Congress's enactment of the Civil Rights Act of 1991 permitting recovery by prevailing employees of compensatory and punitive damages.

2. Whether the "dual" standard for awarding attorneys' fees under Title VII violates the Fifth Amendment due process rights of prevailing Title VII defendant-employers.

STATEMENT OF CORPORATE AFFILIATION FILED PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Court, Petitioner, Dana Corporation Parish Division, states that it has no non-wholly owned subsidiaries and no parent company.

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No. _____

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ROBERT LEE NEWTON,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Dana Corporation Parish Division respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit (Docket No. 95-2074) entered a judgment order on February 5, 1997, which is unreported and is reprinted in the Appendix to this Petition at App. 1a.[1] The February 5, 1997 judgment order, however, did not dispose of Dana's appeal. The Court of Appeals entered a subsequent judgment order on February 18, 1997, which also is unreported and reprinted in the Appendix to this Petition at App. 3a. The November 14, 1995 memorandum decision of the district court, denying Petitioner its attorneys' fees after the entry of judgment in its favor

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[1]References to the Appendix of this Petition are abbreviated as "App. ___a" including the page number of the Appendix.

(Docket No. 94-CV-4958 (E.D. Pa.)), also is unpublished and is reprinted at App. 5a.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §§ 1254(1). The United States Court of Appeals for the Third Circuit entered a judgment order on February 15, 1997, which affirmed the district court's November 14, 1995, denial of Petitioner's request for attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and Statutory provisions are involved in this case. Pursuant to United States Supreme Court Rule 1(f), the verbatim text of these provisions is reproduced in the Appendix to this Petition at pages App. 6a.

United States Constitution, Amend. V.

42 U.S.C. § 2000e-5(k). Attorney's fee; liability of Commission and United States for costs

42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment

42 U.S.C. § 1988 Proceedings in vindication of civil rights

Fed. R. Civ. P. 54(d) Costs; Attorneys' Fees.

STATEMENT OF CASE

I. INTRODUCTION

This case places squarely before the Court the issue raised by Justice Thomas in *Fogerty v. Fantasy*, 114 S. Ct. 1023, 1035-36, __ U.S. __ (1994) (Thomas, J., concurring): whether this Court's interpretation of Section 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 421 (1978) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), creating a "dual" standard for prevailing Title VII litigants, should remain the law of the land.[2]

This case raises an issue of national significance, potentially involving every employer in the United States with 15 or more employees, in every segment of the economy and in every industry. *See* 42 U.S.C. § 2000e to 2000e-17 (Supp. 1997); U.S. Sup. Ct. R. 10. Petitioner submits that this Court should grant certiorari to reconsider the "dual" standard for awarding attorneys' fees this Court articulated almost 20 years ago because Congress's intervening enactment of the Civil Rights Act of 1991 and the explosive growth in employment-related civil litigation suggests that an evenhanded standard is more consistent with Congress's intent and would be sufficient to promote the remedial purposes of Title VII.

In the Civil Rights Act of 1991, Congress added to Title VII the remedies of a jury trial, compensatory and punitive damages. The availability of these significant new remedies, combined with the exponential growth in the number of employment discrimination cases and the equitable relief which always has been available under

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[2]As a prevailing Title VII defendant, Dana's primary concern is with this Court's "dual" or heightened standard articulated in *Christiansburg*. However, *Christiansburg* only created a "dual" standard with respect to the allocation of attorneys' fees because of this Court's earlier pronouncement in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1968). Thus, Dana submits that this Court should review simultaneously *Christiansburg* and *Albemarle* to determine the appropriate standard for allocating attorneys' fees under Title VII for all "prevailing parties." 42 U.S.C. § 2000e-5(k).

the Act, have undermined the original rationale of *Christiansburg* and *Albemarle*. Prevailing Title VII plaintiffs no longer should be "presumed" to be entitled to preferential treatment with respect to the award of attorneys' fees. Similarly, prevailing Title VII defendants no longer should be presumptively precluded from recovering attorneys' fees. Now that Congress has included in Title VII the right to a jury trial and additional legal remedies for prevailing plaintiffs, a uniform, evenhanded standard should be applied under which trial courts may award attorneys' fees to employers, as well as to employees, in appropriate cases. This is an issue that the Court is uniquely situated to remedy.

II. FACTUAL AND PROCEDURAL DEVELOPMENTS

The facts in this case typify those in contemporary employment discrimination cases. 42 U.S.C. § 2000e-5(k). Newton's allegations and conduct demonstrate the ease with which employees can initiate and prolong litigation, thereby increasing the attorneys' fees to employers, even when the employer ultimately prevails. Respondent's counsel drafted an Amended Complaint, *see* Fed. R. Civ. P. 8 (short plain statement of allegations), and submitted sworn materials, *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc), which precluded Dana from obtaining summary judgment or judgment as a matter of law prior to a jury trial, even though there was no merit to his claims.

A. Dana Corporation's Reading, Pennsylvania Operations and Its Collective Bargaining Agreement.

Dana Corporation Parish Division manufactures frames for automobiles, trucks, pick-up trucks, side rails for heavy tractor trailer machinery and other light industrial products. Respondent, Robert Lee Newton, has been a welder in Dana's Reading, Pennsylvania facility since 1988. At its Reading facility, Dana employs approximately 2,300 employees of which approximately 2,000 are non-managerial employees, including Newton, who are covered by a Collective Bargaining Agreement ("CBA") between Dana and the United

Steelworkers of America, Local Affiliate 3733 ("Union"). At all times relevant to Newton's lawsuit, Dana and the Union were parties to a CBA effective October 29, 1989 through October 30, 1994.

1. Dana's "Restricted" or "Light Duty" Program.

In April 1993, Dana and the Union reached agreement upon a "restricted" or "light duty" program for injured workers. This program complements Dana's regular *bona fide* seniority system under the CBA by gainfully rehabilitating injured employees, through light, yet productive, assignments rather than having the employees be absent from work and collect full workers' compensation benefits. Dana's restricted duty program includes "make-up" work assignments which can be "non-value added" positions and are sensitive to employees' medical restrictions and include non-stressful jobs such as painting parts, sweeping floors and stuffing envelopes.

Employees also may be placed in "value added" positions along the assembly line. Employees who have injuries also can work in positions, under the auspices of the restricted duty program, for which they might not otherwise be assigned due to their union seniority. Employees in the restricted duty program are paid a contractually negotiated "make-up" wage so that they do not lose any money by being assigned to the restricted duty program. At all times relevant to his lawsuit, Newton was, and continues to be, assigned to the restricted duty program as a "value added" welder.

2. Implementation of Medical Restrictions of Employees' Physicians.

To implement the restricted duty program, Dana relies on medical restrictions written by each employee's treating physician to determine which positions the employee can perform without risk of further exacerbating his or her injury. Employees have their own physicians, rather than a company physician, diagnose the proper restrictions (*e.g.*, no twisting or excessive lifting). Dana generally accepts the medical restrictions and updates from the outside health care provider, even though these physicians rarely visit the plant.

After Dana receives a new or revised medical restriction, and verifies a new position for the employee with the company physician, the company coordinates the new assignment through the employee's union representative and then places the employee into the new position for the duration of the restriction. The uncontroverted testimony at trial confirmed that the restricted duty program applied to all injured workers, regardless of race.

B. Proceedings Before the Equal Employment Opportunity Commission.

In 1994, Newton filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). *See* 42 U.S.C. § 2000e-5(b). Newton alleged, under oath to the EEOC, that Dana had denied him medical treatment, forced him to work in unsafe conditions because of his race, and forced him to take positions which were not assigned to non-African-American employees. Newton asked the EEOC for a Notice of Right to Sue Determination before Dana could file its response with the EEOC or have an opportunity to conciliate the case. The EEOC issued Newton a Notice of Right to Sue, without making any finding as to the Charge, on May 16, 1994.

C. Proceedings in the District Court.

On August 15, 1994, the last day to file suit under Title VII, 42 U.S.C. § 2000e-5, Newton filed a *pro se* Complaint against Dana in the United States District Court for the Eastern District of Pennsylvania alleging, *inter alia*, disparate treatment and a hostile work environment in violation of Title VII. Newton subsequently obtained counsel and filed an Amended Complaint.

1. Respondent's Dilatory Tactics in Pretrial Proceedings.

Newton undertook *no* discovery. Nevertheless his conduct frustrated Dana's ability to promptly and inexpensively resolve this matter. By way of illustration only, Newton opposed Dana's Motion

to transfer the case to a district court judge sitting in Reading, Pennsylvania (thereby increasing the costs for both witnesses and counsel), Newton filed a Motion for Leave to Amend his Complaint which Dana opposed and the district court denied for "vagueness". Once Newton ultimately obtained leave to file an Amended Complaint, he waited until the eve of trial to serve it. Newton failed to appear at his deposition, thereby forcing Dana to take his Court-ordered deposition less than two weeks before trial, and he opposed Dana's motions for summary judgment. Throughout this process, Newton made outrageous settlement demands. Unfortunately, practices and tactics such as these are somewhat common in employment discrimination cases.

Newton's repeated dilatory conduct ultimately resulted in Dana expending thousands of dollars on pretrial and post-trial motions, almost all of which Dana won. For purposes of this Petition, Newton's pre-trial conduct is relevant because although the district court ruled in Dana's favor at almost every stage of the proceedings, as did the jury, Dana was unable to recover any of its attorneys' fees.

2. The Jury Trial.

Newton's case was tried on August 4, 7 and 8, 1995. On August 8, 1995, the district court charged the jury, and after commenting on the record that Newton's evidence of disparate treatment was "very weak", submitted all of Newton's claims to the jury. Within 75 minutes (including lunch) the jury returned a verdict in favor of Dana on all claims. On the same date, the district court entered final judgment in favor of Dana.

3. Respondent's Post-Trial Motions.

Following the entry of judgment on or around August 18, 1995, Newton filed a motion for a new trial and judgment notwithstanding the verdict. Newton's motion alleged judicial error by the district court. No supporting memorandum of law was submitted, contrary to E.D. Pa. Local R. Civ. P. 7.1. No proof of a transcript order was filed. Dana opposed Newton's motion for post-trial relief.

4. Dana's Motion for Attorneys' Fees.

On August 22, 1995, Dana timely filed a Motion to recover $50,191.30 in Attorneys' Fees under Section 706 of Title VII, 42 U.S.C. § 2000e-5(k). Dana's papers complied with this Court's requirements in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) and *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546 (1986), properly using a "lodestar method" for calculating its fees, and submitted appropriate affidavits as to the rates charged and the prevailing rates in Philadelphia, Pennsylvania, for employment discrimination litigation.

On November 14, 1995, the district court entered a memorandum opinion and order denying Newton's post-trial motions. The Court also entered an order, without opinion, denying Dana's motion for attorneys' fees. The district court failed to make any findings of fact and conclusions of law on Dana's attorney's fee application as required by Fed. R. Civ. P. 54(d).

5. Proceedings in the United States Court of Appeals for the Third Circuit.

Newton and Dana both filed appeals from the district court's orders to the United States Court of Appeals for the Third Circuit, challenging the entry of judgment and the denial of attorneys' fees, respectively. Newton's appeal was dismissed for lack of prosecution and then reinstated. On February 18, 1997, the court of appeals dismissed Newton's appeal on the merits without a written decision (App. 3a). The court of appeals also dismissed, without opinion, Dana's appeal of the denial of its motion for attorneys' fees.

REASONS FOR GRANTING THE PETITION

This case presents the opportunity to remedy the nationwide inequity regarding the allocation of attorneys' fees to "prevailing parties" in employment discrimination cases, an issue of both statutory and constitutional significance. The "dual" standard of allocating fees leaves employers, especially small- and medium-sized com-

panies, without adequate means with which to defend themselves against the increased number of workplace discrimination claims. Significantly, despite the gravity of this matter, the issue of allocating attorneys' fees is not frequently presented to appellate courts. Of the limited number of Title VII defendants willing to risk the prohibitive costs of defending a case to a jury, *most* prevailing Title VII defendants, having already expended thousands of dollars on the trial and accompanying motion practice, are disinclined to expend even more resources pursuing appellate remedies in the hope of what realistically will be no more than a *partial* recovery of attorneys' fees.[3] Thus, even though there is no split in the Courts of Appeals, this case presents an issue of the utmost significance and one that will continue to evade review by the appellate courts unless this Court reviews the standard it articulated in 1978.

I. THE "DUAL" STANDARD FOR AWARDING ATTORNEYS' FEES UNDER TITLE VII IS NO LONGER APPROPRIATE IN VIEW OF CONGRESS'S ENACTMENT OF THE CIVIL RIGHTS ACT OF 1991

Chief Justice Rehnquist stated that this Court created a "dual" or heightened standard for prevailing Title VII defendants in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 421 (1978) "based on what we found to be the important policy objectives of the Civil Rights statutes, and the intent of Congress to achieve such objectives through the use of plaintiffs as private attorney[s] general." *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1026-27 (1992) (citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). Regardless of whether plaintiffs were to serve as "private attorneys general", as described in 1978, the enactment by Congress of the Civil Rights Act of 1991 makes the "dual" standard for awarding fees to prevailing parties in Title VII redundant and indeed improper.

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[3]Similarly, an employer found liable under Title VII is hardly in a position to challenge the allocation of attorneys' fees under *Albemarle* or *Christiansburg*.

A. The "Dual" Standard Was Proper When Title VII Was Exclusively an Equitable Remedy.

Christiansburg followed a logical evolution of cases interpreting Title VII as it had existed *prior to the Civil Rights Act of 1991*, when the Act was primarily equitable in nature. When Congress enacted the Civil Rights Act of 1964, it included in Section 706 of the Act language which provided that "the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee." 42 U.S.C. § 2000e-5(k). In enacting this provision, Congress followed the "American Rule," that each side bears its own litigation costs absent express statutory authorization to the contrary. *See Alyeska Pipeline Service Co. v. Wilderness Soc.*, 421 U.S. 240 (1975) (reaffirming the "American Rule" prior to enactment of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988).

Beginning in 1968, however, the Court departed from the plain language of the statute and interpreted the "evenhanded" language that, subject to the district court's discretion, a "prevailing party" may recover its fees, and substantially limited the discretion of the district courts. In *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), the Court decided that plaintiffs who obtained injunctive relief under Title II of the Act "*should ordinarily recover an attorney's fee* unless special circumstances would render such an award unjust." *Piggie Park*, 390 U.S. at 402.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court applied *Piggie Park's* reasoning to Title VII of the Act and held that prevailing Title VII plaintiffs similarly should "*ordinarily*" receive attorneys' fees under Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), upon successful recovery of back pay, under Section 706(g), 42 U.S.C. § 2000e-5(g), for job- related discrimination.

In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), the Court refused to apply an "evenhanded rule" and held instead that, unlike prevailing Title VII plaintiffs, prevailing Title VII

defendants may recover their attorneys' fees *only* "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421. The Court stated:

> First, as emphasized so forcefully in *Piggie Park*, the plaintiff is the chosen instrument of Congress to vindicate "a policy that Congress considered of the highest priority." 390 U.S. at 402. Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. As the Court of Appeals clearly perceived, "these policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant."

Christiansburg, 434 U.S. at 418. This Court also has noted that the reason Congress provided for an attorney fee award was to "attract competent counsel". *Hensley v. Eckerhart*, 461 U.S. 441, 444 (1983) (citing S.Rep. No. 94-1011, p. 6 (1976) (Brennan, J., concurring).

By 1978, the Court had therefore affirmed in *Alyeska* that the "American Rule" applied absent statutory language to shift attorneys' fees, but in cases involving employment discrimination it had created a "bastardized American Rule," which neither compelled both sides, as a matter of course, to bear their own fees ("American Rule"), nor awarded the "prevailing party" its fees under the plain language of 42 U.S.C. § 2000e-5 ("British Rule"), unless it was the plaintiff.

B. Policy Considerations Predating the Civil Rights Act of 1991 Should Not Continue to Control the Interpretation of Title VII, as Amended.

The Court's reliance on "equitable considerations" for interpreting Title VII during the 1970's may have fully comported with the statute's equitable purpose and limited forms of relief available to prevailing plaintiffs at that time. Petitioner submits, however, that

the one-sided judicially-created restrictions on the discretion of the district courts to award attorneys' fees to prevailing employers are no longer necessary or appropriate in view of the Civil Rights Act of 1991, which substantially expanded the scope of Title VII and provided plaintiffs with rights of recovery so substantially greater than before that employees realistically encounter no difficulty in obtaining competent counsel to represent them in these cases.

At the time of *Piggie Park*, *Albemarle* and *Christiansburg*, Title VII essentially provided employees only the equitable remedies of back pay and reinstatement. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1968) (back pay). Indeed, one reading of *Christiansburg* suggests that the Court intentionally interpreted § 2000e-5(k) of Title VII to be an additional penalty for unsuccessful Title VII defendants. 434 U.S. at 418. The Civil Rights Act of 1991, however, expressly provided for *compensatory and punitive damages* including "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses". 42 U.S.C. § 1981a(b)(1)-(2). These elements of damage are expressly in addition to back pay, interest on back pay or front pay previously and otherwise available under 42 U.S.C. § 2000e-5(g).

In addition, when Congress legislatively overruled this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), holding that plaintiffs could sue under 42 U.S.C. § 1981 for interference based upon race both in the formation and implementation of workplace contracts, Congress removed any statutory cap on the amount of damages an employee can recover in a properly pled and proved race discrimination case. 42 U.S.C. §§ 1981(b) and 1981a(b)(4). Thus, to the extent "equitable" or other factors counseled in favor of this Court's defining a "dual" standard for shifting fees to "protect" prevailing Title VII plaintiffs and "penalize" unsuccessful Title VII defendants, Congress eliminated the continuing basis for these policy assumptions by including the remedy of compensatory and punitive damages in the 1991 Civil Rights Act.

C. Jury Trials and the Increased Difficulty of Obtaining Summary Judgment Further Counsel for Review of Title VII's "Dual" Standard.

Moreover, at the time the Court decided *Piggie Park*, *Albemarle* and *Christiansburg*, there was no right to a jury trial under Title VII. The statutory jury trial right now compels employers to expend resources on the panoply of pre-trial activities associated with a jury trial that might have been avoided when the district court could consider the weight of the evidence at each stage in the proceedings. Now that employers, such as Petitioner, must endure a jury trial to demonstrate that they are not "violators of federal law", as this Court suggested in *Christiansburg*, and are subject to compensatory and punitive damages if found liable, this Court's judicially created "dual" standard for awarding attorneys' fees, respectfully, must be revised.

Further compounding the one-sided nature of the procedures in these cases, is that despite this Court's recent teaching with respect to the burden of production and the propriety of granting summary judgment in employment discrimination cases, *Hicks v. St. Mary's Honor Ctr.*, 509 U.S. 502 (1993), the Courts of Appeals have narrowly construed *Hicks* and blunted the effectiveness of summary judgment as a means of terminating unmeritorious claims prior to a full trial. By way of example last year, the Court of Appeals for the Third Circuit in *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc) held that an employee need only offer evidence to suggest that the employer's proffered non-discriminatory reason is untrue in order to ultimately prevail at trial and *a fortiori* survive a defense motion for summary judgment. *Id.* at 1067; *see also Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994) (plaintiff must offer evidence only to raise material issue of fact as to defendant's proffered reason to defeat summary judgment). Thus, once a plaintiff establishes a *prima facie* case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), and its progeny, it is practically speaking impossible for Title VII defendants to resolve litigation without submitting to a jury or acquiescing to settlement.

II. THE "DUAL" STANDARD IS IMPROPER IN VIEW OF THE 400% INCREASE IN EMPLOYMENT DISCRIMINATION FILINGS SINCE *ALBEMARLE* AND *CHRISTIANSBURG*

This Court has often reconsidered its precedents when significant changes have occurred that make modification of rules appropriate. Indeed, the Court has held that even when *stare decisis* is at its zenith, changes in factual situations or the unworkability of a prior precedent over time may counsel for reconsideration of established precedent, even if such precedent *was proper at the time it was announced. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (reversing *National League of Cities v. Usery*, 426 U.S. 833 (1976)); *Brown v. Board of Education*, 347 U.S. 483 (1954) (reversing "separate but equal" policy in education); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (supporting minimum wage and reversing *Lochner v. People of the State of New York*, 198 U.S. 45 (1905)). Significant changes have occurred in the nature of the remedies permitted under Title VII. The number of claims actually filed and the ease with which plaintiffs can secure competent counsel in Title VII cases make appropriate reconsideration of the "dual" standard.

The United States Court Administrator's Office has documented a 400% increase in the number of employment discrimination cases between 1978 and 1996 compared with a federal court case filings increase of only 125% from 1970 through 1989. *See* J. DONAHUE and P. SIEGELMAN, *The Changing Nature of Employment Discrimination Litigation*, 43 STANFORD LAW REVIEW 983 (1991).[4]

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[4]The number of Charges of Discrimination filed with the EEOC in 1996 increased to approximately 98,000, from approximately 64,000 in 1991. 6 EMPLOYMENT DISCRIMINATION REPORT 141 (Feb. 7, 1996). These statistics *understate* the dimension of this increase and the burden on employers because the foregoing statistics do not account for the increased number of cases involving state anti-discrimination laws, brought either in state court or brought in federal court pursuant to 28 U.S.C. § 1367, in which courts frequently follow the Court's disposition of attorneys' fees requests under Title VII.

Year	Employment Cases Filed
1978	5,504
1979	5,477
1980	5,017
1985	8,082
1990	8,413
1991	8,140

Year	Employment Cases Filed
1992	10,771
1993	13,650
1994	16,623
1995	20,579
1996	23,037

Not only has the growth in the number of cases increased, the financial exposure employers face also has increased. The following statistics from the Court Administrator's Office chronicle the increased demands made by and verdicts in favor of employee claims.[5]

Year	Plaintiff's Demand (Non-Jury)	Average Award (Non-Jury)	Plaintiff's Demand (Jury)	Average Award (Jury)
1983	$100,000$	20,500	$100,000	$27,000
1985	$100,00	$33,500	$250,000	$61,500
1987	$225,000	$33,000	$400,000	$99,500
1989	$200,000	$46,000	$250,000	$166,500
1991	$150,000	$53,000	$150,000	$225,000
1993	$180,000	$47,500	$300,000	$97,500
1995	$300,000	$100,000	$300,000	$101,000

[5]These statistics are derived from Case Category 442 "Civil Rights—Employment", as tracked by the Court Administrator's Office based on new Complaint filings. While these numbers do not indicate the number of Title VII claims, as compared to other federal employment statutes, the numbers underscore the growth in exposure to employers. Moreover, the Americans with Disabilities Act and the Age Discrimination in Employment Acts, contain substantially similar fee-shifting language.

The explosion in employment discrimination cases has alarmed not only employers, but the lower federal judiciary. In a recent opinion, district court Judge Sporkin lamented the fact that full trials were required in almost all employment discrimination cases and urged relief for the district courts due to the excessive employment litigation:

> This case shows once again the need to adjust our anti-discrimination laws. The evidence needed to make a *prima facie* case is much too low. It seems that almost anyone not selected for a job can maintain a court action. It is for this reason that the federal courts are flooded with employment cases. We are becoming personnel czars of virtually every one of this nation's public and private institutions. The drafters of the original legislation could never have intended the resulting consequences from what they deemed to be necessary progressive legislation.

Tschappat v. Reich, ___ F. Supp. ____, 1997 WL 130719 (D.D.C. Mar. 18, 1997). (Sporkin, J.). As employers are confronted with increasing numbers of cases, some of dubious merit, increased difficulty in obtaining summary judgment and heightened penalties for violating Title VII, they increasingly must defend themselves in court. The standards articulated 20 years ago simply are no longer closely attuned to the realities of this kind of litigation.

This Court should return the awarding of attorneys' fees to the discretion of the district court, which is uniquely situated to assess both the weight of the evidence and the conduct of the litigants and counsel, with instruction that the "American Rule," as described in *Alyeska Pipeline Service Co. v. Wilderness Soc.*, 421 U.S. 240 (1975), and its progeny, generally should apply, and that both Title VII parties have equal standing to apply for attorneys' fees. This Court

should grant review to exercise its supervisory powers over the lower courts and rectify the imbalance in employment litigation.

III. THE COURT SHOULD RESTORE TITLE VII'S PLAIN LANGUAGE MEANING AND INSTRUCT THE DISTRICT COURTS TO APPLY A TOTALITY OF THE CIRCUMSTANCES TEST FOR AWARDING ATTORNEYS' FEES

Congress enacted an "evenhanded" allocation of attorneys' fees to "prevailing" Title VII litigants within the discretion of the district court. The Court should grant review to reinstitute the plain language interpretation of Section 706 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988, and return to the district courts discretion to enter attorney fee awards in employment cases.[6]

The Court has made clear that the modern, and preferred, methodology of statutory construction is to interpret statutes according to their plain language meaning. *See Leatherman v. Tarrant County Narcotics Intel. Coord. Unit*, 507 U.S. 163 (1993) (abandoning years of judicially-created heightened pleading requirements for cases brought under 42 U.S.C. § 1983); *Fogerty v. Fantasy*, 114 S. Ct. 1023,

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[6]Petitioner acknowledges that the standards for attorney fee shifting provisions under 42 U.S.C. §§ 1981, 1983, 1985 and 42 U.S.C. § 2000e-5(k) frequently are the same. This Petition, however, seeks review only of the standard applied in employment discrimination cases. Whether suits against government entities, where financial concerns are not the same, for violations of rights protected under 42 U.S.C. § 1983 should have the same standard for allocating fees is a question not presented by this case.

__ U.S.__ (1994) ("prevailing party" under Copyright Act should not employ "dual" standard based on status of party).[7]

Justice Thomas' comments on the necessity of a "plain meaning" interpretation of the fee-shifting provisions of Title VII underscore why this Court should grant review of the present "dual" standard.

> The Court's analysis [in *Fogerty*] rests on the mistaken premise—a premise implicit in *Christiansburg*—that whether we construe a statute in accordance with its plain meaning depends upon the statute's policy objectives and legislative history. Although attorney's fee provisions may be interpreted "in light of the competing equities that Congress normally takes into account," *Zipes, supra*, 491 U.S., at 761, those "equities" cannot dictate a result that is contrary to the statutory language. "Our task is to apply the test, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Grp.*, 493 U.S. 120, 126 (1989). When the text of the statute is clear, our interpretive inquiry ends.

Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1035-36 (Thomas, J., concurring) (citing *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989)).

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[7]Interestingly, the Fair Labor Standards Act, 29 U.S.C. § 216(b), the Family and Medical Leave Act, 29 U.S.C. § 2617(a)(3) and the Clayton Act, 15 U.S.C. § 15(a) contain language which *mandate* fee shifting to prevailing plaintiffs. The Fair Housing Act, 42 U.S.C. § 3612(c), contains language which suggests an award only for prevailing plaintiffs while Title VII and 42 U.S.C. § 1988 suggest an "evenhanded" discretionary standard for either party. Congress has never adopted a statutory scheme that required or mandated payments to prevailing defendants. *See Christiansburg*, 434 U.S. at 415-16. While Dana submits that the mandatory fee shifting provisions for plaintiffs, as contained in the FLSA or the FMLA, are similarly violative of the due process clause, for the reasons set forth at pages 20-21 of this Petition, those statutes demonstrate that when Congress wants to award fees only to prevailing plaintiffs, it uses language different than that contained in 42 U.S.C. § 2000e-5(k).

Restoring the plain language meaning of Title VII's fee-shifting provisions will not leave the district courts without direction from the Court. To the contrary, as the Court stated in *Christiansburg*, the "question in the case before us is what standard should inform a district court's discretion in deciding whether to award attorney's fees to a successful Title VII defendant." 434 U.S. at 416. The present "dual" standard, under which prevailing employees "ordinarily" are awarded attorneys' fees, effectively reads the district court's discretion out of the statute when a Title VII *employer* has prevailed.

The Court should grant review (i) to reinstate in Title VII cases the "American Rule" presumption articulated in *Alyeska*, that parties should normally bear their own costs, and (ii) to articulate a rule providing that, when a party prevails in an employment discrimination case, it must first make a showing to overcome the *Alyeska* presumption and providing for a "totality of the circumstances test" to be applied to each discrete component of the litigation. By way of example, some of the factors for lower courts to apply might include:

- whether the availability of damages, without an award of fees, is so limited as to frustrate further claims;
- which party "prevailed";
- the success at trial (or in settlement) compared to the initial demands;
- the type of fee agreement each party has with its attorneys and the amount of attorney's fee allowable on a contingency basis in the jurisdiction of the case;
- the correlation between the plaintiff's initial allegations and the amount of corroborative evidence produced through discovery and at trial;
- the success or failure of each motion or other pre-trial activity;
- the amount of time expended on procedural and evidentiary issues which were actually necessary to advance the litigation or preserve a party's interests;

- whether either party should have abandoned claims or defenses as the evidence in discovery or at trial suggested the respective positions were untenable;
- whether either side improperly tried to prolong the litigation;
- the existence or absence of subjective bad faith.[8]

These, or other similar factors can be utilized by the district court and developed as an appropriate substitution for the "bright line rule" practically requiring denial of attorney's fee applications by employers who have prevailed in Title VII cases. Indeed, the "dual" standard not only is *contra* the plain language of the Act, but it has become a source of uneven treatment in the courts and a source of abuse in view of the increased number of Title VII filings. This Court should grant review to establish a new set of criteria to instruct the district courts so as to effectuate the plain language of the 42 U.S.C. § 2000e-5(k) in view of the Civil Rights Act of 1991.

IV. THE "DUAL" STANDARD VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION

This Court, not Congress, must remedy the present imbalance of attorneys fees in the employment discrimination arena. U.S. CONST., Amend. V. In addition to the fact that the *Christiansburg* and *Albemarle* decisions created the "dual" standard for awarding attorneys' fees from otherwise plain language under Title VII (as compared to legislation), Petitioner submits that the issue of attorneys' fees is one of constitutional significance and not merely statutory construction.

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[8]It is submitted that in this case the district court erred in not awarding a portion of its attorneys' fees because Newton's claims that Dana denied him medical treatment and assigned him to positions due to his race, without taking any discovery, were "frivolous, unreasonable and without foundation". *See Christiansburg*, 434 U.S. at 421. However, under "a totality of the circumstances" test, the district court would properly be allowed to consider *all* of Newton's conduct during discovery, the trial and post-entry of judgment and not just the ultimate finding in the case. Fed. R. Civ. P. 54(d) (specified findings of fact required).

Congress has the authority, consistent with the due process clause of the Fifth Amendment, to include in Title VII's scope of remedies compensatory and punitive damages as a rational means for accomplishing the important goals of civil rights. Congress does not, however, have the right to create such remedies, when their effect, combined with the *Albemarle* and *Christiansburg* standards, deprives Title VII defendants of the right to a fair defense. *See Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (awarding sanctions and attorneys' fees invokes due process concerns); *In re Eliscu*, 139 Bankr. 883 (N.D. Ill. 1992) (same); *see also BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996) (constitutional concerns attach to procedure by which punitive damages may attach).

This Court stated that a Title VII plaintiff is acting as a "private attorney general" vindicating a Congressional policy of the "highest priority." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978). Congress advanced this Court's interpretation of Title VII when it included in the 1991 Civil Rights Act the right to a jury trial and compensatory and punitive damages. Petitioner submits, however, that the "dual" standard this Court created in 1978, now creates an unconstitutional burden of defending against these enhanced penalties. Simply put, due process is violated when only one party to a discrimination action is exposed under the statute to compensatory and punitive damages, but it *also* is deprived of the right to fully and vigorously defend against the claims of discrimination. U.S. CONST., amend. V and VII.

Once an employer is forced to defend against compensatory and punitive damages before a jury, it is entitled to fully and fairly defend itself without being unilaterally encumbered by the prospect of paying both its attorneys' fees and those of the plaintiff while the plaintiff bears no such burden. The adversarial process is unconstitutionally compromised when a Title VII defendant must continuously evaluate the effect its tactical decisions will have on the plaintiff's fees, as may be shifted back to the employer. Consistent with due process, a Title VII defendant should never have to evaluate whether to forego certain defenses, discovery or motions because

their use during litigation will result in the "doubling" of its attorneys' fees should the plaintiff prevail. The increased severity of violating Title VII under the Civil Rights Act of 1991, mandates that employers be allowed to fully and zealously defend themselves without minimizing their defense out of consideration for the plaintiff's ability to shift and collect attorneys' fees.[9] Simply put, Congress does not have a right to impose financial penalties *and* interfere with an employer's fundamental right to defend itself against such allegations.

The Court should grant review to remedy the constitutional infirmity of allowing compensatory and punitive damage claims against Title VII defendants who are not on equal standing with respect to the allocation of attorneys' fees as are the charging plaintiffs.

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[9]This situation becomes particularly acute when the defendant is confronted with the Hobson's choice of defending against a claim which raises an admitted technical violation of Title VII, or being compelled into a substantial settlement because the cost to the Title VII defendant of paying both the plaintiff's and its own attorneys' fees is simply excessive. Due process must protect employers of all sizes who cannot afford to withstand the barrage of lawsuits and the relative inability to inexpensively terminate these cases.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-2073 AND 2074

ROBERT LEE NEWTON,

Appellant in 95-2073,

v.

DANA CORPORATION, PARISH DIVISION

Cross-Appellant in 95-2074.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 94-cv–4958)
(District Judge: Honorable Ronald L. Buckwalter)

Submitted Under Third Circuit LAR34.1(a)
January 30, 1997

Before: BECKER and ROTH, Circuit Judges
and BARRY[1], District Judge

JUDGMENT ORDER

After consideration of all contentions raised by appellant and cross-appellant,

IT IS ADJUDGED AND ORDERED that the judgment of the District Court, entered October 5, 1995, be and is hereby affirmed.

Each party to bear its own costs.

BY THE COURT,

_____

Circuit Judge

Attest:

P. Douglas Sisk, Clerk

Dated: February 5, 1997

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[1]The Honorable Maryanne Trump Barry, United States District Court Judge, District of New Jersey, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 95-2073 AND 2074

ROBERT LEE NEWTON,

Appellant in 95-2073,

v.

DANA CORPORATION, PARISH DIVISION

Cross-Appellant in 95-2074.

Appeal from the United States District Court
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(D.C. Civil Action No. 94-cv–4958)
(District Judge: Honorable Ronald L. Buckwalter)

Submitted Under Third Circuit LAR 34.1(a)
January 30, 1997

Before: BECKER and ROTH, Circuit Judges
and BARRY[1], District Judge

JUDGMENT ORDER

After consideration of all contentions raised by appellant and cross-appellant,

IT IS ADJUDGED AND ORDERED that the judgment of the District Court, entered **November 14, 1995,** be and is hereby affirmed.

Each party to bear its own costs.

BY THE COURT,

Circuit Judge

Attest:

P. Douglas Sisk, Clerk

Dated: February 18, 1997

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[1]The Honorable Maryanne Trump Barry, United States District Court Judge, District of New Jersey, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT LEE NEWTON, Plaintiff,	:	
v.	:	CIVIL ACTION NO. 94-4958
DANA CORPORATION PARISH DIVISION, Defendant.	:	

ORDER

AND NOW, this 14th day of November, 1995, upon consideration of Defendant Dana Corporation Parish Division's Motion for Attorneys' Fees (Docket No. 51) and Plaintiff's Memorandum of Law Contra Defendant Dana Corporation Parish Division's Motion for Attorneys' Fees (Docket No. 53), it is hereby ORDERED that Defendant Dana Corporation Parish Division's Motion for Attorneys' Fees is DENIED.

BY THE COURT:

_____

RONALD L. BUCKWALTER, J.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amend. V.

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 2000e-5(k). Attorney's fee; liability of Commission and United States for Costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * *

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1988 Proceedings in vindication of civil rights

(b) Attorney's fee

In any action or proceedings to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, Title VI of the Civil Rights Act of 1964, or section 13981 [sic] of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Fed. R. Civ. P. 54(d) Costs; Attorneys' Fees.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related non-taxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document as provided in Rule 58.